JAMES E. CARTER
v.
DEPARTMENT OF THE NAVY

Docket No.
DC07528010065

OPINION AND ORDER

Appellant appealed what he alleged was an involuntary resignation from the Department of the Navy, basing his claim on deception by the agency. His resignation, he alleged, had been submitted in reliance on an agreement between himself and agency officials that he would be allowed to resign without prejudice and with a clean record. The Standard Form (SF) 50, Notice of Personnel Action, issued by the agency following appellant's resignation contained a notation that appellant had resigned after receiving written notice of proposed removal for unexcused tardiness.

After a hearing, the presiding official made findings that the agency had either purposefully or by default led appellant to rely on an agreement to resign without an adverse notation appearing on his record, and the agency's failure to put this agreement into effect rendered the resignation involuntary and therefore a separation adverse to appellant and reviewable by this Board.

Having found the resignation involuntary, the presiding official then proceeded to find that, except for the adverse remarks appearing on the SF-50, no harm accrued to Mr. Carter and ordered the agency to cancel the previous SF-50 and issue a new personnel action form which would contain no comments adverse to Mr. Carter.[1]

[1]In the initial decision, the presiding official addressed the agency's contention that the Federal Personnel Manual Supplement required that the resignation SF-50 reflect that a proposal to remove had been issued, by noting that the FPM is not binding law or regulation but merely a directive concerning the preparation of the SF-50. *Cf. Doe v. Hampton*, 566 F.2d 265, 273 n. 21 (D.C. Cir. 1977) (FPM is a "massive thesaurus of rules, guidelines, suggestions, and secular imprecations"). Of course, if the agency had truly believed that the FPM Supplement provision imposed an absolutely binding legal duty which left the agency with no discretion in the matter, then the agency's promise to appellant to include no adverse notation on his record was a plain misrepresentation, advertent or otherwise.

It is clear, however, that insofar as the FPM includes more than a restatement of statutory and regulatory requirements, it constitutes only OPM's official "guidance" to agencies. *See* OPM, Manager's Handbook 193 (1979). *Cf.* 5 U.S.C.A. 1103(b) and 1105 (Supp. 1980). Moreover, OPM has expressly called to the attention of all agencies the substantial legal risks involved if a Standard Form 50 includes any reference to the fact that a resignation was tendered after an oral notification that a disciplinary action was proposed against the resigning employee. *See* Memorandum of OPM Director Campbell to Heads of Departments and Independent Establishments, "Constitutional Limitations on Information Contained on the Standard Form 50," Oct. 22, 1980. *See also Harper v. Blumenthal*, 478 F. Supp. 176 (D.D.C. 1979).

Appellant's petition for review sets forth the arguments that the proper relief in the circumstances of this appeal is reinstatement, that the presiding official should have allowed certain areas to be explored in discovery, and that appellant should be awarded attorney's fees if he prevails.

It is well settled that the voluntary nature of a resignation is an issue of fact. *McGucken v. United States*, 407 F.2d 1349 (Ct. Cl.), *cert. denied*, 396 U.S. 894 (1969); *Paroczay v. Hodges*, 297 F.2d 439 (D.C. Cir. 1961). Although employee resignations are presumed to be valid, *Christie v. United States*, 518 F.2d 584 (Ct. Cl. 1975), this presumption will not prevail if the employee comes forward with sufficient evidence to establish that the resignation was the result of duress, or was based upon misleading information furnished by agency officials. See *Quick v. United States*, 428 F.2d 1294 (Ct. Cl. 1970); *White v. Treasury*, 4 MSPB 11 (1980).

Having been affected by an adverse action, appellant was entitled to the procedural safeguards established under 5 U.S.C. 7513 and 5 C.F.R. 752. On the record before us, it is not outside the range of appreciable probability that the agency would have decided not to remove appellant for a cumulative total of 19 minutes AWOL, if the agency had exercised the greater deliberation required by those procedural safeguards. Therefore, we find that the agency's failure to comply with the procedures established by these statutory and regulatory provisions constitutes harmful procedural error. *See Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980). This requires reversal of the agency action. 5 U.S.C. 7701(c)(2). The presiding official erred in failing to so conclude.[2]

The Board notes that a motion for payment of attorney fees in this case was contained in the petition for review. Such motion should be filed with the presiding official within ten days of the date of this decision. 5 C.F.R. 1201.37.

Accordingly, the petition for review is GRANTED, the finding in the initial decision dated September 22, 1980, that no harm accrued to the

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In any event, no statute or regulation forbids an agency from settling a disputed personnel matter by agreeing to omit adverse notations in the personnel record of an employee who, in consideration of such agreement, elects to resign rather than face removal procedures. If an agency so agrees, and then fails to comply with the express condition on which it obtained the employee's reciprocal agreement to resign, it cannot reasonably expect the employee to be held to his or her end of the bargain. A contrary conclusion would render meaningless the concept of "voluntary" resignation and would also be inconsistent with the policy favoring settlement of such disputes to avoid litigation and encourage fair and speedy resolution of issues. *See Richardson v. EPA*, 5 MSPB 289 (1981).

[2]Had the agreement between appellant and the agency been submitted for the record in settlement of appellant's appeal to this Board, the agreement would have been enforceable by the Board in accordance with its terms. In this case, however, the Board has no jurisdiction to enforce the specific terms of the agreement. *See Richardson v. EPA*, 5 MSPB 289 (1981).

appellant by the agency's failure to use the procedures provided in 5 U.S.C. 7513 is REVERSED, and the agency is hereby ORDERED to cancel the removal (purported resignation) of appellant.

With the exception of the attorney fees question, this is the final decision of the Merit Systems Protection Board in this case. The agency is hereby ORDERED to furnish evidence of compliance with this Order to the Field Office within ten (10) days of receipt of this decision.

Appellant is hereby notified of the right to petition the Equal Employment Opportunity Commission to consider the Board's decision on the issue of discrimination. A petition must be filed with the Commission no later than thirty (30) days after appellant's receipt of this order.

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

RONALD P. WERTHEIM.

WASHINGTON, D.C., *May 7, 1981*